SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 745

THE SCHENECTADY UNION PUBLISHING COMPANY, PETITIONER,

vs.

MARTIN L. SWEENEY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 22, 1942.

—8876

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MARTIN L. SWEENEY, Plaintiff-Appellant,

vs.

THE SCHENECTADY UNION PUBLISHING COMPANY, Defendant-Appellee

STATEMENT UNDER RULE XIII

Summons issued out of the United States District Court for the Northern District of New York and was served upon defendant on December 13, 1939. Bill of Particulars filed January 20, 1940. Answer filed February 2, 1940. Notice of Motion for judgment on the pleadings served September 10, 1940, returnable before the Honorable Frank Cooper, United States District Court Judge on the 21st day of September, 1940. Parties appeared and argued motion on said date and submitted briefs. Opinion of the court handed down January 8, 1941, granting the motion. Order dismissing complaint entered in the office of the Clerk of the United States District Court for the Northern District of New York on the 15th day of January, 1941. Judgment dismissing the complaint and for costs in the sum of $28.50 entered in the office of the said Clerk on the 15th day of February, 1941. Notice of appeal filed by plaintiff-appellant in the office of the said Clerk on the 11th day of February, 1941. Thereafter and on the 28th day of February, an order was made by the Honorable Frank Cooper, upon the Stipulation of the attorneys herein, amending the notice of appeal to include the judgment entered on the 15th day of February, 1941, which order and notice of appeal were filed in the office of said Clerk on March 1st, 1941.

[fol. 2] This is an appeal from an order dismissing the complaint of the plaintiff herein on the ground that it failed to set forth facts sufficient to constitute a cause of action and from the judgment entered on such order.

There has been no change in parties or their attorneys since the commencement of this action.

IN DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action 302

MARTIN L. SWEENEY, 1628 Columbia Road, Dover Center, Ohio, Plaintiff,

vs.

SCHENECTADY UNION PUBLISHING COMPANY, Defendants

COMPLAINT

Complaint of Martin L. Sweeney, through his attorneys, DeGraff and Foy, respectfully shows to the Honorable Court as follows:

1. The plaintiff is a citizen of the State of Ohio; and the defendant, Schenectady Union Publishing Company, is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000.00).

2. The defendant, Schenectady Union Publishing Company, during the time hereinafter mentioned was, and still is, the publisher of a certain newspaper or periodical known as and called the "Schenectady Union Star," which news- [fol. 3] paper or periodical is widely circulated and read in the State of New York and the states of the United States and among the people thereof.

3. The defendant is sued for damaging and injuring the plaintiff through the processes of libel as hereinafter more fully will appear and because the defendant composed, wrote, published, circulated, distributed and caused to be composed, written, published, circulated and distributed, the libel hereinafter set forth.

4. That whereas the plaintiff was, and still is, a duly elected Member of the Congress of the United States from the State of Ohio and has been such for over seven years, and an Attorney at Law in good standing as a member of the Bar in the State of Ohio and until the commission of the grievances hereinafter set forth, was not suspected of conduct, practices, or prejudice toward his constituents, clients

or fellowman because of race, creed or color, or lacking in respect for religious and racial tolerance for the tasks incident to the carrying out of his duties as a duly elected representative of the people of the State of Ohio and as a practicing attorney in the State of Ohio.

5. Yet the defendant, well knowing the premises, but contriving and intending to injure plaintiff and deprive him of the respect, confidence and esteem peculiarly essential to plaintiff's profession and office, and contriving and intending to deprive plaintiff of his good name, reputation and the esteem of his constituents and clients, and to bring him into disastrous scandal, ridicule, and professional disrepute, before his constituents, clients, professional associates, friends, neighbors, acquaintances, and the public in general, and to hold plaintiff up to public scorn, contempt, ridicule and disgrace, did heretofore, to wit, on or about the 23rd day of December, 1938, falsely and wrongfully publish and circulate of and concerning the plaintiff, in the said "Schenectady Union Star" under the title or heading of "Washington [fol. 4] Daily Merry-Go-Round," the following false, scandalous and defamatory libel: ·

"A hot behind-the-scenes fight is raging in Democratic congressional ranks over the effort of Father Coughlin to prevent the appointment of a Jewish judge in Cleveland.

"The proposed appointee is Emerich Burt Freed, U. S. District Attorney in Cleveland and former law partner of Senator Bulkley, who is on the verge of being elevated to the U. S. District Court.

"This has aroused the violent opposition of Representative Martin L. Sweeney, Democrat of Cleveland, known as the chief congressional spokesman of Father Coughlin.

"Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew, and one not born in the United States. Born in Hungary in 1897, Freed was brought to the United States at the age of 13, was naturalized 10 years later.

"Irate, Representative Sweeney is endeavoring to call a caucus of Ohio Representatives December 28 to protest against Freed's appointment."

The foregoing was meant and intended to convey that plaintiff was and is guilty of Un-American, racial prejudice against persons of Jewish origin and guilty of conduct unbecoming a public officer and to hold plaintiff in contempt

in the eyes of his constituents and clients he represents in a professional capacity.

6. By reason of the aforesaid publication and its wide circulation in the State of New York, the states of the United States, and among the people thereof, plaintiff has been greatly injured in his good name, fame and reputation, in the conduct and execution of his official duties as a duly elected and chosen representative of the people of the State of Ohio in the Congress of the United States, in pursuance of his profession as a practicing attorney in good standing before the Bar in the State of Ohio, in his standing in the [fol. 5] community wherein he resides, and in the high regard, respect, confidence and esteem he has hitherto enjoyed among his associates both in the Congress of the United States and in the legal fraternity and elsewhere, as aforesaid, in the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00).

Wherefore, the plaintiff brings this, his suit, and claims damages of the defendant in the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00), besides costs.

George W. Foy. DeGraff and Foy, Attorneys for Plaintiff, Office and P. O. Address, 11 North Pearl Street, Albany, New York.

IN UNITED STATES DISTRICT COURT

ANSWER

The defendant Schenectady Union Publishing Company, for an answer to the complaint.

I

For a first separate and complete defense.

1st. Admits its incorporation and that it is and was the publisher of that certain daily newspaper "Schenectady Union Star," published in the City of Schenectady, N. Y.

2nd. Admits that on or about December 23rd, 1938, it published in its newspaper aforesaid under the title or heading of "Washington Merry-Go-Round" an article containing, among many other news items of timely interest,

the matters alleged in the complaint and in plaintiff's Bill of Particulars.

3rd. Admits that plaintiff has brought this action for damages for an alleged libel.

[fol. 6] 4th. Admits upon information and belief that plaintiff was and still is a member of Congress of the United States from District of Ohio and has been such for over seven years and is an Attorney at Law and a member of the Bar of the State of Ohio.

5th. Denies the allegation contained in paragraph 1 of the complaint that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand dollars ($3,000).

6th. Denies upon information and belief that until the alleged grievances complained of in the complaint, plaintiff was not suspected of prejudice towards his fellowman because of race, creed or color and was not suspected of being lacking in respect for religious and racial tolerance but except as thus admitted or denied, states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the complaint except as heretofore expressly admitted.

7th. Denies each and every other allegation in said complaint contained.

II

Defendant further answering the complaint and for a second separate and complete defense alleges upon information and belief.

8th. Realleges each and every admission and denial of the first defense as though re-written here.

9th. Avers that the published article complained of in said complaint is a true, correct and impartial report of facts that actually occurred and as written in said article and that the comment thereon of the plaintiff, a member of Congress of the United States, is fair, and is therefore privileged and that each and all of the matters set forth in said article a copy of which is annexed hereto as Schedule "A," which plaintiff in his Bill of Particulars claims and relies on as false and untrue, were and are true.

[fol. 7] III

Defendant further answering the complaint and for a partial defense and in mitigation of any damages to which plaintiff might otherwise appear to be entitled, alleges upon information and belief.

10th. Realleges each and every admission and denial contained in the defenses herein numbered "I" and "II," as though re-written here.

11th. Avers that prior to and at the time of the publication of the article complained of, this defendant by an agreement with United Feature Syndicate, Inc., a well known reputable and trustworthy news agency, received and paid for and published a certain syndicated and copyrighted news article entitled "Washington Merry-Go-Round," written by Drew Pearson and Robert S. Allen coauthors, and that the news and matters therein were received and gathered by the said Drew Pearson and Robert S. Allen from their various agents, reporters and correspondents in the City of Washington, D. C., and throughout the United States.

12th. Avers that said article complained of was with other news dispatches and in the usual course of its daily business received by this defendant from the said United Feature Syndicate, Inc.

13th. Avers that this defendant received the said article in its usual course of business and in good faith and believed the same to be true, and relied upon the previous accuracy and truth of many other articles of news previously received from the said Drew Pearson and Robert S. Allen and upon its and their good reputation for truth and veracity, and this defendant denies that it acted maliciously and further alleges that believing said article to be true, this defendant, in good faith and without malice and with no intent to injure or harm or defame the plaintiff, published the same in the same form as received and without [fol. 8] suggestion or comment of its own, and as a copyrighted article of news, and that a true copy of said article as published on or about the 23rd, day of December, 1938 is hereto annexed marked Schedule "A" and made a part hereof.

14th. Avers that this defendant had heretofore and at all times found the news articles under the title "Washington Merry-Go-Round," written by Drew Pearson and Robert S. Allen and distributed and sold by the said United Feature Syndicate, Inc., news service and agency to be truthful and reliable and that the said co-authors at all times employed careful and trustworthy and competant agents, correspondents, reporters and editors and they were relied upon and their articles believed to be true by defendant at the time of the publication complained of and were calculated to and did induce in defendant the belief that said publication was true.

15th. Avers that said article was published as an item of news and in good faith and without malice and with no intent to injure or harm or defame the plaintiff, and the defendant believed the statements contained in said article to be true when made and fair comment of the plaintiff and defendant denies that it acted maliciously or with any intention whatsoever to injure or harm or defame or damage the plaintiff.

16th. Avers that said article Schedule "A" parts of which are complained of in the complaint and which is also set forth in plaintiff's Bill of Particulars was intended to be a fair and true report and comment upon, the official conduct of a public official concerning a matter of public interest and importance; and that said article was not written or published maliciously or otherwise or for the purpose of causing harm to the plaintiff.

IV

The defendant for a further answer to the complaint alleges:

[fol. 9] 17th. Particularly denies each and every allegation in the complaint that alleges that the plaintiff sustained damages.

Wherefore, defendant demands judgment dismissing the complaint together with the costs of this action.

Charles G. Fryer, Attorney for Defendant, 243 State Street, Schenectady, N. Y.

The defendant demands a Trial by Jury.

SCHEDULE "A" ANNEXED TO ANSWER

THE WASHINGTON MERRY-GO-ROUND

(Trademark)

Story of Christ-Child, Son of Transients, to be Dramatized for Migrant Farm Workers—Stock Exchange Faces Drastic Action for Sidestepping Whitney Case

December 23, 1938.

By Drew Pearson and Robert Allen

Washington, Dec. 23—A hot behind-the-scenes fight is raging in Democratic Congressional ranks over the effort of Father Coughlin to prevent the appointment of a Jewish judge in Cleveland.

[fol. 10] The proposed appointee is Emerich Burt Freed, U. S. District Attorney in Cleveland and former law partner of Senator Bulkley, who is proposed for U. S. District Court.

This has aroused the violent opposition of Representatives Martin L. Sweeney, Democrat of Cleveland, known as the chief Congressional spokesman of Father Coughlin.

Jew, Born in Hungary

Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew, and one not born in the United States. Born in Hungary in 1897, Freed was brought to the United States at the age of 13, was naturalized ten years later.

Irate, Congressman Sweeney is endeavoring to call a caucus of Ohio Congressmen December 28 to protest against Freed's appointment.

The First Transient, Christmas 1,938 Years Ago

Big problem facing Farm Security Administration is that of migrant agricultural workers in California. But for one day this week there will be no problem. Henry Wallace and Hollywood are banding together to wipe out the worries of migrant workers Saturday.

Hollywood big shots—including Eddie Cantor, Miriam Hopkins and Herbert Marshall—will stage a radio dramati-

zation of the life of a transient, as it has not been presented since the First Transient Family sought shelter 1,938 years ago.

The scene will be as humble as the scene at Bethlehem. It will be the FSA camp at Shafter, California. Every child among Kern County's agricultural workers has been invited, many of them Mexicans and Negroes.

Some of the workers will take part with Hollywood stars in a series of sketches, and the children will take home bountiful Christmas stockings. Stars are contributing not [fol. 11] only talent but funds. One star gave a fund-raising party last week that netted $500.

NBC will carry the broadcast, beginning at 2:30 Pacific time, Saturday. Titled "Christmas for One-Third of a Nation," the party will bring comfort and joy to those who wander under conditions not unlike those experienced by Joseph and Mary twenty centuries ago.

Social Whirl

At White House receptions, as guests come abreast of the President to shake hands, they are counted by a White House policeman, who rings them up with a little tabulator held in his hand.

The average number at a single reception is just over 1,000 which is too many to be fed with home-made cookies. They are bought outside • • • As many as 40 or 50 different establishments supply the White House • • • Twenty-seven government greenhouses are searched for their best blossoms whenever the White House stages a big reception • • • In the pre-Roosevelt days, guests used to line up in the state dining room and move east to pass the President. Now they gather in the East Room, and move west. Reason for the change is that pre-Rooseveltians didn't feed the guests, and the dining room was bare. Now its tables are laden, and guests come to it only after they have been officially received.

First Round in Stock Exchange

The governors of the New York Stock Exchange haven't heard the last of their refusal to act on the sizzling SEC report on the Richard Whitney scandal.

Dr. Robert M. Hutchins, Chicago University's, youthful president and representative of the public on the Stock Exchange board, resigned because it would not crack down

on J. P. Morgan, Thomas Lamont, E. H. Simmons and other Wall Street moguls involved in the Whitney mess. [fol. 12] But this resignation was just the opening of the fight.

Hutchins demanded action on the SEC report after the Exchange rulers had sidestepped it for two months. He argued that the Exchange could not apply the rod to small fry and pussyfoot on big shots if it wanted to convince the public it could govern itself and keep a clean house.

Douglas vs. Morgan

It is a sure bet that Douglas, chairman of SEC, will not muff the Hutchins' pass. The Morgan group which balked Hutchins have been Douglas' bitterest foes in Wall Street, and he is not the kind to take anything lying down.

Until this incident, Douglas played ball with the "reform" administration that came into Exchange control last spring after the Whitney Scandal.

With the Exchange board backing away from punishing Whitney's colleagues, the next move will come from the SEC. It has the power to lay down Exchange regulations and that is exactly what it plans.

(Copyright, 1938, by United Feature Syndicate, Inc.)

(Verification.)

[fol. 13] In United States District Court

Plaintiff's Bill of Particulars

Plaintiff, for a bill of particulars in the above entitled action, alleges:

1. That the entire article, as it appeared in the Schenectady Union Star on December 23, 1938, is as follows:

"The Washington
Merry-go-round

(Trademark)

Story of Christ-Child, Son of Transients, To be Dramatized for Migrant Farm Workers—Stock Exchange Faces Drastic Action for Sidestepping Whitney case

by Drew Pearson and Robert Allen

Washington, Dec. 23—A hot behind-the-scenes fight is raging in Democratic Congressional ranks over the effort

of Father Coughlin to prevent the appointment of a Jewish judge in Cleveland.

The proposed appointee is Emerich Burt Freed, U. S. District Attorney in Cleveland and former law partner of Senator Bulkley, who is proposed for U. S. District Court.

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Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew, and one not born in the United States. Born in Hungary in 1897, Freed was brought to the United States at the age of 13, was naturalized ten years later.

Irate, Congressman Sweeney is endeavoring to call a [fol. 14] caucus of Ohio Congressmen December 28, to protest against Freed's appointment.

The First Transient, Christmas 1,938 Years Ago

Big problem facing Farm Security Administration is that of migrant agricultural workers in California. But for one day this week there will be no problem. Henry Wallace and Hollywood are banding together to wipe out the worries of migrant workers Saturday.

Hollywood big shots—including Eddie Cantor, Miriam Hopkins and Herbert Marshall—will stage a radio dramatization of the life of a transient, as it has not been presented since the First Transient family sought shelter 1,938 years ago. The scene will be as humble as the scene at Bethlehem. It will be the FSA camp at Shafter, California. Every child among Kern County's agricultural workers has been invited, many of them Mexicans and Negroes.

Some of the workers will take part with Hollywood stars in a series of sketches, and the children will take home bountiful Christmas stockings. Stars are contributing not only talent but funds. One star gave a fund raising party last week that netted $500.

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In the pre-Roosevelt days, guests used to line up in the state dining room and move east to pass the President. Now they gather in the East Room, and move west. Reason for the change is that pre-Rooseveltians didn't feed the guests, and the dining room was bare. Now, its tables are laden, and guests come to it only after they have been officially received.

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Dr. Robert M. Hutchins, Chicago University's youthful president and representative of the public on the Stock Exchange board, resigned because it would not crack down on J. P. Morgan, Thomas Lamont, E. H. Simmons and other Wall Street moguls involved in the Whitney mess. But this resignation was just the opening of the fight.

Hutchins demanded action on the SEC report after the Exchange rules had sidestepped it for two months. He argued that the Exchange could not apply the rod to small fry and pussyfoot on big shots if it wanted to convince the public it could govern itself and keep a clean house.

Douglas vs. Morgan

It is a sure bet that Douglas, chairman of SEC, will not muff the Hutchins pass. The Morgan group which balked Hutchins have been Douglas' bitterest foes in Wall Street, and he is not the kind to take anything lying down.

Until this incident, Douglas played ball with the 'reform' administration that came into Echange control last spring after the Whitney scandal.

[fol. 16] With the Exchange board backing away from punishing Whitney's colleagues, the next move will come from the SEC. It has the power to lay down Exchange regulations and that is exactly what it plans.

(Copyright, 1938, by United Feature Syndicate, Inc.)"

2. Plaintiff claims, and relies on as false and untrue, the following portions of the article:

Paragraph one (1) insofar as the plaintiff is concerned;

Paragraph three (3);

The first sentence of paragraph four (4) insofar as the plaintiff is concerned; and

Paragraph five (5).

As to the other statements in said article, plaintiff has no knowledge or information sufficient to form a belief as to their truth or falsity.

Dated, January 17, 1940.

DeGraff and Foy, Attorneys for Plaintiff, Office and Post Office Address, 11 North Pearl Street, Albany, New York.

To Charles G. Fryer, Esq., Attorney for Defendant, 243 State Street, Schenectady, New York.

(Verification.)

[fol. 17] IN UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT ON THE PLEADINGS

Take Notice, that on the complaint and on the answer of the defendant the undersigned will move this Court at a Special Term thereof to be held in the Federal Court Building in the City and County of Albany, N. Y., on the 21st day of September, 1940, at the opening of Court on said day or as soon thereafter as counsel can be heard for an order granting judgment dismissing the complaint, on the ground that said complaint does not state facts sufficient to constitute a cause of action, and for such other and further relief as to the Court may seem just and proper, together with the costs of this motion.

Dated, September 9th, 1940.

Charles G. Fryer, Attorney for Defendant, 243 State Street, Schenectady, N. Y.

To DeGraff & Foy, Attorneys for Plaintiff, 11 North Pearl Street, Albany, N. Y.

[fol. 18] IN UNITED STATES DISTRICT COURT

OPINION, COOPER, J.

DeGraff & Foy, Attorneys for Plaintiff, 11 North Pearl Street, Albany, N. Y.

Charles G. Fryer, Attorney for Defendant, 243 State Street, Schenectady, N. Y.

COOPER, J.:

This is a motion by the defendant to dismiss the complain-on the ground that the complaint does not state a cause of action against the defendant.

The action is for libel.

The complaint alleges that on December 23rd, 1938, issue of the defendant's newspaper "Schenectady Union-Star" published at Schenectady, N. Y., there was published the following alleged false, scandalous and defamatory libel:

"The Washington Merry-Go-Round (Trade Mark)

By Drew Pearson and Robert Allen

'Washington, Dec. 23rd: a hot-behind-the-scenes fight is raging in democratic congressional ranks over the effort of Father Coughlin to prevent the appointment of a Jewish Judge in Cleveland. The proposed appointee is Emerick Burt Freed, U. S. District Attorney in Cleveland and former law partner of Senator Bulkley, who is on the verge of being elevated to the U. S. District Court. This has aroused the violent opposition of Rep. Martin L. Sweeney, Democrat, of Cleveland, known as the chief Congressional spokesman of Father Coughlin. Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew and one not born in the United States. Born in Hungary in 1897, Freed was [fol. 19] brought to the United States at the age of 13, was naturalized ten years later. Irate, Congressman Sweeney is endeavoring to call a caucus of Ohio Congressmen, December 28th to protest against Freed's appointment * * *.'

(Copyright, 1938 by United Features Syndicate Inc.)"

This action was commenced on December 13, 1939.

The complaint alleges that the plaintiff at the time of the publication was and still is a member of congress from the

State of Ohio, and has been such for over seven years; that he is an attorney at law in good standing and is a member of the bar in the State of Ohio.

The Complaint alleges no special damages.

The plaintiff's cause of action therefore rests upon the claim that the alleged libellous matter above set forth constitutes libel *per se*.

The answer is a general denial and also contains pleas in mitigation of damages; that the alleged libellous article is true and that the same constituted fair comment.

The part of the publication upon which plaintiff in his brief relies to support the charge that the publication is libellous *per se*, is confined to these words:

"Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew, and one not born in the United States."

together with the statement that plaintiff's opposition was "violent" to which might be added that the word "irate" was also used as to the plaintiff's opposition.

Plaintiff contends that the libellous article should be interpreted as meaning that plaintiff was opposed to the appointment of Freed because the latter was a "foreign born Jew."

Plaintiff concedes that the quoted phrase might possibly mean that Sweeney's opposition was because Freed "is a Jew and a person not born in the United States" but says:

[fol. 20] "However, the grammatical construction of the sentence would seem to indicate that the former meaning was the one intended." (Viz. foreign born Jew.)

Accepting plaintiff's construction of the publication his claim is that the publication falsely charges him with violent opposition to the appointment of Freed as a U. S. District Judge because Freed is a foreign born Jew.

It is also to be noted that the alleged libellous article does not say, nor does it necessarily carry the inference, that plaintiff is prejudiced against and intolerant of Jews as such.

Asserting that the law of the State of New York is controlling here (citing Erie Railroad vs. Tompkins, 304 U. S. 64) plaintiff contends under New York law the publication is libellous *per se* and that decisions of other states cited by defendant are inapplicable.

There is no New York Statute defining civil libel and plaintiff cites New York decisions hereinafter mentioned to support the complaint as libellous *per se*.

These decisions hold that a written or printed article is libellous *per se* "if it tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right thinking persons and to deprive him of their friendly intercourse in society." Also "a publication is libellous *per se* where the tendency is to disgrace the plaintiff and bring him into ridicule and contempt."

Some or all of these definitions as to what constitutes libel *per se* are contained in all the New York cases cited by plaintiff.

In Sidney vs. McFadden N. P. Corp., 242 N. Y. 208, 212, the publication, among other things, stated that a well known married actress was the lady-love of a well known screen comedian of somewhat amorous disposition.

The dismissal of the complaint by the Trial Court on the ground that the publication was not libellous *per se*, was [fol. 21] affirmed by the Appellate Division by a divided Court and was reversed by the Court of Appeals by a vote of 4 to 2, Judge Cardoza not voting.

In Kimmerle vs. N. Y. Evening Journal, Inc., 262 N. Y. 99, the publication stated that an estimable rooming house proprietress was courted by a man who, it was charged, had murdered a former wife and had been convicted of the murder and that the rooming house keeper's confidence was won by a detective. The Court held the article not libellous *per se*.

In Bennett vs. Com. Adv. Assn., 230 N. Y. 125, various publications attacked the plaintiff, who was a Congressman. Among other things, one article said:

"Mr. Bennett is a disgrace to his constituency and to New York. He should be whipped out of public office by all decent men. He has sufficiently shown the sort he is. To be attorney for the food contractor and then as Congressman to serve that contractor—

"Congressman Bennett, who has been attorney for a food contractor at Ellis Island and who jockeyed through a rider to an appropriation bill that forbids Commissioner Howe to end the practice of giving a contractor a monopoly to make huge profits out of the food that arriving immi-

grants must buy of him, is smarting under exposure. Mr. Howe does not think it right that Bennett's former client should make large sums of money out of immigrants * * *. It is doubtful if Congressman Bennett is open to legal prosecution."

The Court said in holding the publication libellous *per se:*

"In view of what we have stated we trust it will clearly appear that an article may be libellous which does not charge a crime but makes accusations against a public official which show that he is unworthy of public trust and betrayer of civic confidence."

[fol. 22] In Dall vs. Time, Inc., 252 App. Div. 636, the publication there contained these words:

"Foreign News
France
Son-in-law

Yesterday————son-in-law of President———— shot himself in the White House in the presence of his estranged wife and Mrs.————(wife of the President). He died later in the day."

The above statements are in quotation marks.

Immediately thereafter was the following, which was not quoted:

"If such an event were so briefly reported in the U. S. Press, neither readers nor publishers would be satisfied. Yet almost an exact parallel of that tragedy occurred in the Hotel Continental, Department of Premier Gaston Domergue last week. Mention was limited to a few slender paragraphs in New York Newspapers and a close mouthed silence on the part of French officialdom."

Then followed another paragraph, also not quoted, which gave details of the suicide of the son-in-law of the French Prime Minister in the presence of the latter's wife.

There was no such suicide in the White House and defendant claimed that this was clear from the remainder of the publication. But abundant proof was given that many persons, including many customers of a commodity and brokerage house, believed that the suicide had actually taken place.

A verdict of a jury for no cause of action was set aside by the Trial Judge, whose decision was affirmed by the Appellate Division in a lengthly opinion holding that the publication was libellous *per se*. The decision was affirmed by the Court of Appeals without opinion. That Court said, "The question of whether the libel charged here is a libel as a matter of law is not before us."

[fol. 23] The only remaining case cited by plaintiff is Morey vs. Morning Journal Association, 123 N. Y. 207.

In that case publication was contained in a news paper of the City of Rochester, where the plaintiff, a married man of good reputation resided and was engaged in business:

"Refuses To Be Reconciled"

"A Rochester Society Belle who insists upon being married:

(Special to Morning Journal.)

Rochester, N. Y., Oct. 10th. Upper Tendom is highly excited over a threatened breach of promise suit against John E. Marcy, Jr., a stockholder of the Union and advertiser, and prominent in society circles. A prominent belle will be plaintiff in the action. Marcy and his friends are moving to effect a reconcilation, but the young lady insists upon his marrying her."

That such publication held the plaintiff up to public scorn and ridicule as one guilty of immorality, shameful and disgraceful conduct if not of crime, is manifest.

The foregoing are the New York cases upon which plaintiff relies.

It is clear that while these cases declare the law of this state as to what must be the effect or tendency of publications to constitute them libellous *per se*, none of the publications are at all like the publication here in suit.

Among the many cases cited by defendant are some from this state.

In Hills vs. Press Company, 122 Misc. 212, affirmed on opinion below in 212 A. D. 752, the complaint was dismissed as not libellous *per se*.

In Seelman on Libel and Slander, the following was said covering this case:

"Of a fuel administrator that he exercised favoritism as such, aiding certain dealers, refusing others, was unfair

[fol. 24] and inactive in work and in enforcing prosecutions was held not libellous * * * A publication to be libellous of a person must, or in case of a public officer, must touch him in his office and have a tendency to injure him therein by an accusation which shows him unworthy of public trust and a betrayer of public confidence * * *."

In Tanzer vs. Crowley Publishing Company, 240 App. Div. 202, a criticism of a former mayor more severe than here stated and bordering on a charge of unfitness for office was held not libellous *per se*.

In O'Connell vs. Press Publishing Co., 214 N. Y. 252 a publication stating that plaintiff invented a device which might be used for criminal purposes, that he showed it to a person in whose business it might be used and that it was so used for a criminal purpose, was held not to be libellous *per se*.

There is a slight distinction between a publication relating to a private citizen and one relating to a public officer. In a constitutional republic where freedom of speech and the press is guaranteed, comment on, or criticism of the political or official acts or views of a public officer is not libellous *per se*, merely because it hurts his feelings or distresses him.

Unless such published words impute immorality, violation of law, or charge expressly or by direct inference that he is corrupt, unworthy of public trust or a betrayer of civic confidence, or has been guilty of acts shameful and disgraceful in character, the publication is not libellous *per se*.

Tanzer vs. Crowley Pub. Co., 240 A. D. 203, *supra*.

Hills vs. Press Company, 122 Misc. 212, affirmed 212 A. D. 752, *supra*.

Gardner vs. Home Life Publishers, 237 App. Div. 200.

Hamilton vs. Eno, 81 N. Y. 116.

Grashley vs. Press Pub. Co., 74 App. Div. 118 affirmed 179 N. Y. 27.

[fol. 25] Briarcliffe Lodge Hotel Company vs. C. S. Publishers, *et al.*, 260 N. Y. 106, 118.

Defendant cites cases from various states to support its contention but no reference need be made to them as the law of libel varies in some of the states.

But a newspaper may not publish false statements regarding public officers if such statements are defam-tory.

Bingham vs. Gaynor, 203 N. Y. 27, 32.

The publication was not made concerning the plaintiff in his profession as a lawyer. It is not libellous in that respect if not relating to plaintiff in his profession.

Keene vs. Tribune Association, 76 Hun 488.

There have been decisions both ways in similar actions brought by this plaintiff against various newspapers based on this same publication or some variation or modification thereof.

The U. S. District Court of the Northern District of Illinois (Eastern Division) in an opinion handed down July 1, 1940, in an action by the same plaintiff against the Joliet Publishing Company held the publication there involved to be libellous *per se*.

It appears in that case, however, that the publication contained additional matter not contained in the publication here, which additional matters showed the superior fitness of the applicant for such appointment and that he was second on a list of five recommended by the Cleveland Bar Association and that all the others were eliminated for reasons stated.

It appears also that the laws of Illinois relating to criminal libel have been adopted by the Supreme Court of Illinois as the definition of libel in a civil action as well as criminal. The opinion so states and cites as authority:

Ogren vs. Rockford Star Publishing Company, 288 Ill. 405.

[fol. 26] No such rule obtains in this state.

Moreover, the opinion seems to be based on the ground that a charge that plaintiff is congressional spokesman for Father Coughlin, well known as bitter and vicious anti-Semitic and that joining with Father Coughlin in opposing the appointment of Freed "solely because he is a Jew certainly exposes plaintiff to public hatred, contempt and ridicule."

This case, therefore, is not in close analogy.

While there have been three ot' er decisions denying motions to dismiss the complaint, one in the same U. S. District Court in Illinois, one in the Eastern District of Wisconsin, and one in the Eastern District of Arkansas, whether the publication is like the one in Wisconsin or the one here does not appear, nor was any opinion written except a brief

memo in the other Illinois case based solely on association with Father Coughlin.

In one case in the State Courts of Ohio—Sweeney vs. Beacon Journal Publishing Company (Court of Common Pleas, Summit County), July 27, 1940, the Court held that the publication was not libellous *per se* and dismissed the complaint. The publication was presumably much like the publication here. In that case the Court said:

"There were and probably still are, many people who look upon Father Coughlin as a modern oracle and Messiah. There are many people who are opposed to placing people in office who are foreign born.

The Constitution of the United States will not permit a foreign born person to hold the office of President. The executive and judicial departments of the Government are equal and coordinate. How then can it be said to be unlawful to oppose the appointment of a foreign born person to the office of Judge.

There are a very large number of persons who are opposed to placing in public office persons whose religious faith is other than what is known as Protestant."

[fol. 27] In the publication here involved, there is, of course, no charge of crime, immorality, corruption in office or shameful personal conduct, which would induce an evil opinion of him in the minds of right thinking people.

Is there anything stated in the publication which would bring him into public ridicule, scorn or contempt.

The Federal Constitution forbids any foreign-born person from holding the office of President of the United States but there is no constitutional prohibition against a foreign-born citizen holding any other Federal office, though a certain number of years of citizenship is prescribed for Senators, Congressmen, and perhaps other Federal Officers.

It should be accepted as true that many people have prejudices of some kind. Prejudices relating to nationality and religion are quite common even in this country of constitutional right, liberty and equality.

The holding up of a person to ridicule, scorn or contempt, which makes a publication libellous *per se* is not that felt by co-religionists or co-nationalists, but ridicule, scorn or contempt of the general public or among right thinking people.

Opposition to such appointment of a foreign-born member of any foreign nationality could not fairly be said to have such effect or tendency. Nor could opposition to the appointment of a foreign-born member of any religion fairly be said to have such effect and tendency.

What is common knowledge, the Court must be deemed to know.

That there has long been prejudice in this country against the foreign-born who have come here must be accepted and especially so against such foreigners who aspire to public office.

The prejudice against foreign-born holding public office was once so great in this country that shortly after the middle of the last century a political party was formed to make sure that the government would rest only in the hands of native-born Americans. It was the "Native American [fol. 28] Party" popularly called the "Know Nothing party" because it was a secret order and the members professed to know nothing when questioned about it.

In the State elections of 1855 it carried most of New England, New York, Kentucky and California and gained some successes in other states. Thereafter it passed out of existence as an organization.

That was nearly a century ago but that feeling has continued to some extent to this day.

That there are such prejudices is greatly to be deplored. That there should be the fullest tolerance cannot be questioned.

There is without doubt some prejudice against the appointment of any foreign-born person, Jew or others, to judicial office despite the fact that there have been foreign-born Jews and others appointed to high judicial office who have served with ability and conspicuous fidelity to our country.

Though a man well fitted for judicial office should not be opposed because he is a foreign-born Jew, nevertheless a false statement that a Congressman who is also a lawyer opposed the appointment of a certain man on such ground, does not hold or tend to hold him up to public scorn, contempt or ridicule, and is not for any other reason libellous *per se*.

The motion to dismiss the complaint is granted.

Plaintiff may amend his complaint within twenty days.

January 8, 1941.

[fol. 29] IN UNITED STATES DISTRICT COURT

ORDER GRANTING MOTION TO DISMISS COMPLAINT

The defendant above named having duly moved for an order dismissing the complaint herein on the ground that it appears on the face of the complaint that said complaint fails to state facts sufficient to constitute a cause of action.

Now, on reading the complaint herein, and on reading and filing the notice of motion dated the 9th day of September, 1940, with proof of due service thereof, and after hearing Charles G. Fryer, attorney for the defendant in support of said motion and William F. Conway, of counsel for DeGraff and Foy, attorneys for the plaintiff, in opposition thereto, and due deliberation having been had, now on motion of Charles G. Fryer, attorney for the defendant it is,

Ordered that the said motion be and the same hereby is granted and that the complaint herein be dismissed on the ground that it appears on the face of the complaint, that said complaint fails to state facts sufficient to constitute a cause of action and that the defendant have judgment against the plaintiff dismissing the complaint with the costs of the action but with leave to the plaintiff to serve an amended complaint within twenty days after the date of the service of a copy of this order with notice of entry thereof upon the plaintiff's attorneys, and in which case the defendant is granted Ten dollars motion costs, and if the complaint is amended and the motion costs paid the costs of the action shall abide the result of the trial.

Frank Cooper, U. S. District Judge.

Dated, January 13th, 1941.

[fol. 30] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK

JUDGMENT

The summons and complaint in the above-entitled action having been duly served upon the defendant December 13th, 1939, and the defendant having appeared by its attorney, Charles G. Fryer, and having served its answer herein on the 1st day of February, 1940, and the defendant

having moved for an order dismissing the complaint, by notice of motion dated the 9th day of September, 1940, upon the ground that it appears on the face of the complaint that said complaint fails to state facts sufficient to constitute a cause of action, and the motion having come on regularly to be heard before Hon. Frank Cooper, United States District Judge, at a Special Term of this court held in the City of Albany, N. Y., on the 21st day of September, 1940, and said motion having been granted by order dated the 13th day of January, 1941, and entered in the office of the Clerk of the United States District Court for the Northern District of New York at Utica, N. Y., on the 15th day of January, 1941, and a copy thereof having been duly served on DeGraff and Foy, Esqs., attorneys for the plaintiff on the 15th day of January, 1941.

And it appearing from the annexed affidavit of Charles G. Fryer, attorney for the defendant, verified the 11th day of February, 1941, that more than twenty days have expired since the service of said order and that the plaintiff has not served an amended complaint or paid the motion costs as provided by the terms of the said order.

Now, on Motion of Charles G. Fryer, attorney for the defendant it is,

Ordered, Adjudged and Decreed that the summons and complaint be and the same hereby are dismissed, and it is further

[fol. 31] Ordered, Adjudged and Decreed that the defendant recover of the plaintiff the sum of Twenty-eight and 50/100 dollars costs and disbursements of this action as taxed and that the defendant have execution therefor.

Frank Cooper, U. S. District Judge.

Dated, February 13th, 1941.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL

Notice is hereby given that Martin L. Sweeney, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals, Second Circuit, from the order of the United States District Court for the Northern District of New York, dismissing the complaint of the plaintiff herein,

made the 13th day of January, 1941, and entered in the office of the Clerk of the said Court at Utica, New York, on the 15th day of January, 1941, and from the judgment entered thereon in the office of the Clerk of the said court at Utica, New York, on the 15th day of February, 1941.

Dated, Albany, New York, February 15, 1941.

DeGraff and Foy, by George W. Foy, Attorneys for Appellant, Office and P. O. Address, 11 North Pearl Street, Albany, New York.

[fol. 32] In United States District Court

Stipulation as to Record on Appeal

It Is Hereby Stipulated by and between the attorneys for the respective parties that the foregoing is a true and correct copy of the record on appeal herein. That the same contains all the proceedings and papers and may be filed as the record of appeal herein by the Clerk of the United States District Court for the Northern District of New York. It is further

Stipulated that the foregoing contains true and correct copies of the complaint, answer, bill of particulars, notice of motion for judgment on the pleadings, opinion and order of Cooper, J., judgment and notice of appeal and certification thereof by the Clerk of the United States District Court for the Northern District of New York, is hereby waived.

Dated, March 28, 1941.

DeGraff and Foy, Attorneys for Plaintiff-Appellant.
Charles G. Fryer, Attorney for Defendant-Appellee.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 33] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1940

No. 350

(Argued June 2, 1941. Decided July 18, 1941)

MARTIN L. SWEENEY, Plaintiff-Appellant,

against

SCHENECTADY UNION PUBLISHING COMPANY, Defendant-Appellee

Appeal from an order of the District Court for the Northern District of New York granting defendant's motion to dismiss the complaint in an action for libel on the ground that no cause of action was pleaded.

Before L. Hand, Chase and Clark, *Circuit Judges*

Charles G. Fryer, Attorney for Defendant-Appellee.
DeGraff and Foy, Attorneys for Plaintiff-Appellant; John O'Connor, William F. Conway, of Counsel.

[fol. 34] CHASE, *Circuit Judge:*

Jurisdiction in this suit for the libelous publication by the defendant of the statements concerning the plaintiff which will presently be set forth rests upon diversity; the plaintiff being a resident of Ohio and the defendant a New York corporation. The appeal is from an order dismissing the complaint on motion after the filing of an answer consisting of a general denial; special matter in mitigation of damages; and the truth of the matter printed coupled with the right to comment fairly thereon. No special damages were alleged and the question before us is whether the publication, which on this appeal must be taken for granted as having actually been made and having been false, was libelous *per se*. *O'Connell* v. *Press Publishing Co.*, 214 N. Y. 352; 108 N. E. 556.

The complaint alleged that the plaintiff, a representative in Congress from Ohio and a lawyer by profession, who was a member of the bar in good standing in the State of Ohio, had been "injured in his good name, fame and reputation,

in the conduct and execution of his official duties as a duly elected and chosen representative of the people of the State of Ohio in the Congress of the United States, in pursuance of his profession as a practicing attorney in good standing before the Bar in the State of Ohio, in his standing in the community wherein he resides, and in the high regard, respect, confidence and esteem he has hitherto enjoyed among his associates both in the Congress of the United States and in the legal fraternity and elsewhere" by the publication by the defendant in a newspaper called the "Schenectady Union Star" which is widely circulated and read "in the State of New York and the states of the United States and among the people thereof" of the following:

"A hot behind-the-scenes fight is raging in Democratic congressional ranks over the effort of Father Coughlin to [fol. 35] prevent the appointment of a Jewish judge in Cleveland.

"The proposed appointee is Emerich Burt Freed, U. S. District Attorney in Cleveland and former law partner of Senator Bulkley, who is on the verge of being elevated to the U. S. District Court.

"This has aroused the violent opposition of Representative Martin L. Sweeney, Democrat of Cleveland, known as the chief congressional spokesman of Father Coughlin.

"Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew, and one not born in the United States. Born in Hungary in 1897, Freed was brought to the United States at the age of 13, was naturalized 10 years later.

"Irate, Representative Sweeney is endeavoring to call a caucus of Ohio Representatives December 28 to protest against his appointment."

The matter so published was received by the defendant for publication from an organization known as United Feature Syndicate, Inc. It was published in much the same form in many other newspapers in this country and the resulting libel suits brought in various courts by this plaintiff have been numerous. In some instances motions to dismiss the complaint on the ground that the publication was not libelous *per se* have been granted; in some such motions have been denied. Decisions in other jurisdictions, however, are not only conflicting but are for us inconclusive since they have turned on the application of the libel law

of states other than New York while here we must be governed by the law of the State of New York. *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64. We are not concerned, however, with any libel upon the plaintiff as a lawyer since no [fol. 36] reference was made in the publication to that profession of his. *Keene* v. *Tribune Association*, 76 Hun 488.

The false statements published concerning him neither separately nor together make him out to be a character more offensive to right-thinking people than he would be as the spokesman in Congress of Father Coughlin; who opposed the appointment of a man named Freed to the office of United States District Judge because Freed was a Jew and one not born in the United States; and who was angry about the matter to the point of attempting to have Ohio Congressmen protest in caucus against Freed's appointment.

But, all else aside, they do clearly attribute to him the desire and purpose to try to prevent the appointment of Freed to the office mentioned for the reason that Freed is a Jew who was foreign born. The context does not fairly permit reading the language as making the foreign birth of Freed the all sufficient cause of the plaintiff's opposition to his appointment but rather the contrary by stressing the fact that he was a Jew whose foreign birth apparently but gave an additional basis for plaintiff's opposition. And so the decisive question to be determined on this appeal is whether or not the publication of such false and unprivileged statements concerning the plaintiff within the last few years in the places as alleged in the complaint may be said as a matter of law not to have created any liability in the absence of special damages.

The New York law, as stated in *Kimmerle* v. *N. Y. Evening Journal, Inc.*, 262 N. Y. 99; 186 N. E. 217, makes libelous *per se* the publication of "words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society." To the same effect is *Sydney* v. *MacFadden Newspaper Pub. Corp.*, 242 [fol. 37] N. Y. 208; 151 N. E. 209. This is in general accord with the definition found in the Restatement of the Law of Torts. See § 559. The test is whether right-thinking persons would be reasonably expected to be induced by the

publication to believe that it truthfully represented the plaintiff's attitude on the subject of Freed's appointment and would be likely to regard him as a consequence in such a way that his reputation was injured in one or more of the respects above noted. It is, of course, not easy to apply this general test to a case of this nature. Opinions or prejudices concerning the matter in hand might well lead to different conclusions.

Some principles established in New York libel law are especially helpful in arriving at a just decision. One of them is that a false statement need not necessarily charge the violation of any law to be libelous *per se;* and another is that, when made of a public official, false accusations which may well lead right-thinking people to believe him unworthy of public trust and confidence are libelous *per se. Bennet* v. *Commercial Advertiser Ass'n,* 230 N. Y. 125. And still another is that an unprivileged, published falsehood need not make all, or even a majority of those who read it think the less of the person defamed. It is enough if a noticeable part of many who read it are made to hate, despise, scorn or be contemptuous of the person concerning whom the false statements have been published. *Peck* v. *Tribune Company,* 214 U. S. 195; Restatement, Torts, § 559(e).

And certainly the time and place of publication must be given due weight and effect. This plaintiff by being accused of trying to deprive a man of an appointment to public office because, presumably both in race and religion, he was Jewish would, intolerance being what it is, no doubt gain approval and increased respect in some quarters; and in others, where only the hit bird flutters, there would be indifference; but in a country still dedicated to religious and racial freedom decent, liberty-loving people still are present in great [fol. 38] numbers and still are greatly offended by the narrow-minded injustice of the bigots who see individuals only en masse and condemn them merely because their ancestors were of a certain race or they themselves are of a certain religion. Those who hate intolerance are prone to regard the person who believes in and practices acts of intolerance with aversion and contempt. And in these times when it is universal knowledge that one foreign dictator gained his power by practices which included large-scale, unreasonable Jewish persecutions which have played an important part in making his name an anathema in many parts of this coun-

try the publication of statements such as those alleged may well gain for the person falsely accused the scorn and contempt of the right-thinking in appreciable numbers. Freedom of speech is, as it always has been, freedom to tell the truth and comment fairly upon facts and not a license to spread damaging falsehoods in the guise of news gathering and its dissemination.

Moreover, in places where Jews make up a sizeable portion of the population, as they are known to do in part of the territory in which it is alleged that the defendant's newspaper circulated when the publication was made, it may be taken for granted that there will be an appreciable number who will hate or hold in contempt one who discriminates against a Jew merely because he is a Jew whether born in this country or not. A majority of the court is of the opinion that the complaint is sufficient under the principles above stated and that the defendant should be required to meet it on the merits.

Order reversed and cause remanded for trial.

CLARK, *Circuit Judge* (dissenting):

The decision herein seems to me not in accordance with New York law, where the right of comment on a public [fol. 39] official has been safeguarded in a practical way by "a somewhat different rule" than in ordinary cases and "a clear charge of corruption or gross incompetence holding one up to disgrace and contumely" is required; even an imputation of corrupt or dishonorable motives will be justified as fair comment if it is a reasonable inference from the facts. *Tanzer* v. *Crowley Pub. Corp.*, 240 App. Div. 203, 268 N. Y. S. 620, 622; *Gardner* v. *Home Life Publications, Inc.*, 237 App. Div. 200, 260 N. Y. S. 872, 874; *Hills* v. *Press Co.*, 122 Misc. 212, 202 N. Y. S. 678, 681, affirmed 214 App. Div. 752, 209 N. Y. S. 848. And so the cited cases hold not libelous *per se* comments on public officers more directly suggesting corrupt motives than does the one here—which charges rather bigotry and prejudice than corruption or impropriety in office. In the *Tanzer* case the comment attributed dishonorable motives to a mayor in his appointment of a city attorney; in the *Hills* case the comment charged special favoritism by a city fuel administrator to particular coal dealers and in the prosecution of cases. I think it clear that the charge must go to the extent of definite impropriety in office, as in *Bennet* v. *Commercial Ad-*

vertiser Ass'n, 230 N. Y. 125, 129 N. E. 343, but clearly not in the present case, before recovery can be had without proof of special damages.

Moreover, this view seems to be general, as shown by the fact that the majority of the many actions brought by this plaintiff against various newspapers based on this same article have been dismissed. Many cases were disposed of without reasoned opinions; of those where the matter is discussed, reference may be made to the persuasive reasoning of the Tennessee Supreme Court speaking through Chief Justice Green in *Sweeney* v. *Newspaper Printing Corp.*, 147 S. W. 2d 406, of Cavanah, *D. J.*, in *Sweeney* v. *Capital News Pub. Co.*, D. C. Idaho, 37 F. Supp. 355, of the Ohio Court of Appeals, affirming the dismissal below, in *Sweeney* v. *The Beacon Journal Publishing Co.*, 9th Dist., No. 3352, decided Feb. 27, 1941 appeal dismissed Ohio Sup., 34 N. E. [fol. 40] 2d 764, May 7, 1941 and of the district court in this case. Of such opinions to the contrary we find only two, both by the same district judge in the Northern District of Illinois, apparently unreported, and based upon an interpretation of Illinois law as limiting comment on public officers.

Not only does this seem to me, therefore, new law at least for New York State, but also definitely disturbing law. It would be a fine world to live in if only tolerance were so usual that a charge of the lack thereof against a public official could be so presumptively untrue that it would seem on its face unfair and libelous. But in our present world we must not take the naive view that what ought to be is, and that whoever suggests the contrary is a slanderer; for if we do so, we shut off all healthy criticism of prejudice, and allow bigotry full scope to act with impunity. Even more dangerous is the rationale of the decision that a comment leading an appreciable number of readers to hate or hold in contempt the public official commented on is libelous *per se*. Its broad sweep would take in comments found day after day in the most conservative newspapers, either in direct statement or as quotations of responsible critics, that a public official, particularly a legislator, is pro- or anti-labor, or pro- or anti-Nazi, or pro or anti this or that race, color, or creed. Minority comment on labor, religious and political views and activities of politicians becomes therefore hazardous. And the making of fine distinctions in rationale is indicated by the implication that a comment

suggesting plaintiff's objection to the judicial candidate for his foreign birth alone would have been proper. Of course, the uncertain threat of suit, invited by a rule at once so vague and so extensive, is a restriction on freedom of the press almost as direct as a rule of clear liability.

I do not think it an adequate answer to such a threat against public comment, which seems to me necessary if [fol. 41] democratic processes are to function, to say that it applies only to false statements. For this is comment and inference, as the *Tanzer* case suggests, and hence not a matter of explicit proof or disproof. The public official will always regard himself as not bigoted, and will so testify, sincerely enough. And then the burden of proving the truth of the defense will rest upon the commentator, who must sustain the burden of showing his inference true. If he fails in even a minority of the suits against him—as the sporting element in trials to juries susceptible to varying shades of local opinion would make probable—he is taught his lesson, and a serious brake upon free discussion established. But the common-law requirement of proof of special damages gives him the protection he needs, while at the same time it does prevent him from causing really serious injury and loss by false and unfair statements. That should be the rule applied here, as the district court held.

[fol. 60] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MARTIN L. SWEENEY, Appellant,

vs.

SCHENECTADY UNION PUBLISHING COMPANY, Appellee.

Before L. Hand, Chase and Clark, Circuit Judges

Charles G. Fryer for the appellee.

Per CURIAM:

Petition for rehearing denied.

L. H., H. B. C., C. JJ.

I dissent.

C. E. C., C. J.

Filed August 15, 1941.

[fol. 61] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of August, one thousand nine hundred and forty-one.

Present: Hon. Learned Hand, Hon. Harrie B. Chase, Hon. Charles E. Clark, Circuit Judges.

MARTIN L. SWEENEY, Plaintiff-Appellant,

vs.

SCHENECTADY UNION PUBLISHING Co., Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellee, upon consideration thereof, it is Ordered that said petition be and hereby is denied.

D. E. Roberts.

[fol. 62] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Martin L. Sweeney v. Schenectady

Union Publishing Company. Order. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 15, 1941. D. E. Roberts, Clerk.

[fol. 63] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of August, one thousand nine hundred and forty-one.

Present: Hon. Learned Hand, Hon. Harrie B. Chase, Hon. Charles E. Clark, Circuit Judges.

MARTIN L. SWEENEY, Plaintiff-Appellant,

vs.

SCHENECTADY UNION PUBLISHING CO., Defendant-Appellee.

Appeal from the District Court of the United States for the Northern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Northern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed with costs and cause remanded for trial. Further ordered that execution issue for the collection of said costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 64] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Martin L. Sweeney v. Schenectady Union Publishing Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 18, 1941. D. E. Roberts, Clerk.

[fol. 65] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 66] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 22, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration and decision of this application.

Endorsed on cover: File No. 46,073. U. S. Circuit Court of Appeals, Second Circuit. Term No. 745. The Schenectady Union Publishing Company, Petitioner, vs. Martin L. Sweeney. Petition for a writ of certiorari and exhibit thereto. Filed November 15, 1941. Term No. 745, O. T., 1941.

(8465)

In the United States Circuit Court of Appeals for the Second Circuit

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No. 350—October Term, 1940

MARTIN L. SWEENEY, PLAINTIFF-APPELLANT

against

SCHENECTADY UNION PUBLISHING COMPANY, DEFENDANT-APPELLEE

PETITION OF SCHENECTADY UNION PUBLISHING COMPANY FOR REHEARING

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Second Circuit:

On July 18, 1941, this Court (Judges L. Hand and Chase, Judge Clark dissenting) entered an order reversing an order of January 13, 1941, by District Judge Cooper, of the Northern District of New York, by which the complaint for libel of Martin L. Sweeney, an Ohio Congressman, against the Schenectady Union Publishing Company was dismissed upon motion for judgment on the pleadings. Although the jurisdiction of the Court below was denied in the Answer upon the ground that the matter in controversy did not exceed the sum of $3,000, neither the order appealed from nor the opinion accompanying the order made reference to the question of jurisdiction. By the order appealed from, the complaint was dismissed "on the ground that it appears on the face of the complaint, that said complaint fails to

state facts sufficient to constitute a cause of action." The opinion of the majority of this Court notes, in its first paragraph, that the appeal is from an order dismissing the complaint on motion after the filing of an answer consisting of a general denial, special matter in mitigation of damages, and the truth of the matter printed coupled with the right to comment fairly thereon. The question of the jurisdiction of the Court, except as indicated by diversity of citizenship is, however, not mentioned in the opinion of the majority of this Court.

It is respectfully suggested to this Court that in the exercise of the obligation placed upon it to satisfy itself of the existence of jurisdiction, whenever the question arises,[1] this Court should now find that it did not have jurisdiction of this cause.

The opinion of the majority of the judges sitting in this case appeared to Judge Clark to be

> "• • • not only • • • new law, at least for New York State, but definitely disturbing law."

It is of more than casual interest to note that it was in connection with a New York libel statute that the Supreme Court of the United States first went so far as to assume, though not at that time to decide, that freedom of the press is among the personal liberties which are guaranteed by the Federal Constitution against impairment by the States.[2] The extension of the constitutional guarantees to freedom of the press is now, of course, taken for granted,[3] but it could hardly fail to shock many students of constitutional law to find that this Court sitting in the State of New York, whose laws with respect to freedom of the press

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[1] *McNutt* v. *General Motors Acceptance Corporation*, 298 U. S. 178, 179, 80 L. ed. 1135, 1141.

[2] *Gitlow* v. *People of New York*, 268 U. S. 652, 69 L. ed. 1138 (argued April 12, 1923; reargued November 23, 1923; decided June 8, 1925).

[3] See *Lovell* v. *City of Griffin*, 303 U. S. 443, 82 L. ed. 949.

have been outstanding in their liberality, should be the Court to sound the note of warning against letting the press go too far in reporting and commenting on the acts of public officials who appear to the reporters and commentators to be motivated in some of their actions by prejudice against classes of persons within the United States. It could hardly fail to startle the advocates of the highest degree of personal liberty compatible with the public safety to find that this Court, long noted for the liberality of the views of its members, should be the Court to demand toleration for intolerance and to protect the prejudiced from the imputation of prejudice.

If the decision of the majority is to become the law of the State of New York with reference to libel actions brought by public officials against publishers printing comment of national circulation, imputing motives for lawful official actions which are unpopular with certain groups, the press will not dare to attempt to perform its vital function of comment and criticism and the breeders of discontent will flourish in darkness. If the majority view prevails, a political office-holder is immune to challenge for prejudiced and bigoted action, provided he avoids statutory violation and official corruption, because no group can, as a class, protect itself against even libelous comment;[4] and

[4] See *People* v. *Edmondson*, 4 N. Y. S. 2d, 257 (May 10, 1938), in which Judge Wallace, for the Court of General Sessions, New York County, dismissing an indictment for libel of "all persons of Jewish Religion", said: ". . . an indictment cannot be predicated upon defamatory writings assailing a class or group, unless directly, or by implication, some individual is libeled." • • • ". . . we must suffer the demagogue and the charlatan, in order to make certain that we do not limit or restrain the honest commentator on public affairs." • • • "The statute (N. Y. penal law, Sections 1340 and 1341, re libel) seems to imply that the gravamen of the crime is the harm done to the individual in his community." The Judge quoted from a writer in the *Columbia Law Review* for 1934, page 1344, the following statement:

> "While injury to reputation is the root of the *private* suit, the traditional basis of criminal prosecution for libel is its tendency to create a breach of the peace because of the *intense indignation arising from insult.*"

the general public may not be advised of the motives of a budding Goebbels because sensitive statesmen will be sustained by the Courts in their objections to intrusion upon their right to entertain such opinions as they wish.

The majority opinion neither implies nor suggests that in the present cause the plaintiff was the subject of a

> ". . . clear charge of corruption or gross incompetence holding one up to disgrace and contumely."[5]

It does not apply to this Ohio Congressman the "somewhat different rule" applicable in the case of public officials and in matters of public concern, although the facts reported and the context of the article taken with facts of common knowledge establish the qualified privilege of fair editorial comment.[6] Whereas the law of the State of New York with respect to criticism of one holding public office was heretofore that a published comment might be

> "• • • captious, ill-timed, and without foundation in fact • • •"[7]

the law of this case would leave no recourse or defense to a commentator expressing an opinion as to the motives of a public official, except on presumption of libel *per se*, that he must prove the truth of a charge of distorted intellectual processes usually not capable of explicit proof or disproof.

While the majority opinion is said to be restricted by the doctrine of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, so that the decisions, diametrically contrary, of the Courts of last resort of Tennessee and Ohio, the residence of the Congressman, could not be considered although decided on this specific article contemporaneously, the ma-

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[5] *Tanzer* v. *Crowley Publishing Corp.*, 268 N. Y. S. 620, 622 (Supreme Court, Appellate Div., 4th Dept., January 24, 1934); not since modified.

[6] *Mattice* v. *Wilcox*, 147 N. Y. 624, 42 N. E. 270.

[7] *Tanzer* v. *Crowley*, *supra*.

jority depart from the accepted doctrine of the law of New York as laid down in numerous cases. In *Hills* v. *Press Co.*, for example,[8] it was held that to be libelous *per se* in the case of a public officer, a publication must

> ". . . touch him in his office and have a tendency to injure him therein by an accusation, which would show him unworthy of public trust and a *betrayer of civic confidence.*"[9]

Departing from the limitation to New York precedent, the majority of the judges sitting in this case state that the rule held applicable is in general accord with the definition found in the American Law Institute *Restatement of the Law of Torts*, citing Section 559 and 559(e). But, according to the introduction to this *Restatement*, in the approval of which one of the judges of the majority participated,

> "The object of the Institute in preparing the restatement is to present an orderly statement of the general common law of the United States, including in that term not only the law developed solely by judicial decision, but also the law that has grown from the application by the courts of statutes that have been generally enacted and have been in force for many years."

In zeal for the protection of freedom of speech and liberty of comment as to the motives of political characters, New York has not heretofore been exceeded by Tennessee, Ohio, or others of the several judisdictions in which State and Federal courts have found the present article to be not libelous *per se*. Nevertheless, applying the *Restatement*

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[8] *Hills* v. *Press Co.*, 202 N. Y. S. 678, 681, unanimously affirmed, Appellate Division, Third Department, May 26, 1925, 209 N. Y. S. 848

[9] The majority inaccurately stated this rule as applying, when made of a public official, to "false accusations which may well lead right-thinking people to believe him unworthy of public trust and confidence . . ." The majority cited *Bennett v. Commercial Advertiser Ass'n*, 230 N. Y. 125, decided in 1920, more than four years before *Hills* v. *Press Co.*, *supra*.

of the Law of Torts, publishers might have relied in New York heretofore upon the principles of privileged criticism of Sections 606 and 607 and, especially, upon the principle set forth in the following comment of the authors of the *Restatement,* under Section 607:

> "c. The concern which all citizens have in the proper conduct of public affairs by public officials requires that they have a wide freedom to discuss among themselves the public conduct of their officers and the qualifications of those who seek public office. Those who hold such offices and those who offer themselves as candidates therefor, by so doing subject their public acts to honest criticism even though it be extravagant and unjustified. To make the critic's protection depend not only upon the sincerity of his criticism but also upon its being such as a reasonable man might make would tend to prevent the public from knowing much essential criticism. The advantages gained by the freedom of discussion stated in this Section are therefore sufficient to outweigh the danger that the reputation of public officers or candidates may suffer thereby."

There is nothing in the majority opinion which would indicate that a false statement of opposition by Congressman Sweeney of Cleveland to the appointment of one or more individauls to public office could be regarded as libelous *per se.* The statement which the majority of the judges sitting in this case found to be libelous *per se* is in the first sentence of the fourth paragraph of the portion of the article specified in the bill of particulars, namely,

> "• • • Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew and one not born in the United States."[10]

Neither the plaintiff nor the Court disputes the fact that Freed was a Jew or that Freed was foreign-born, but

[10] The bill of particulars limited the application of the first sentence of paragraph 4 by the words "insofar as plaintiff is concerned."

the court emphasizes the conceivably libelous character of attributing opposition to Freed's appointment to the fact that Freed was a Jew and foreign-born. It is the incorrectness of this attribution of motive which the court found

> "• • • within the last few years in the places alleged in the complaint to be libelous *per se* and in the absence of allegation of special damages."

As stated by the majority, the matter published was distributed by United Features Syndicate, Inc., to many other newspapers in this country and the resulting libel suits brought in various courts by this plaintiff have been numerous. The status of these suits is set forth in Appendix A. It will be observed by the Court that 36 of the 75 suits have been dismissed; 2 have been tried before juries, resulting in verdicts for defendants; 1, tried before a jury after denial of motion to dismiss, resulted in no verdict; and in 4 others a motion to dismiss was denied. The highest courts in the States of Ohio and Tennessee decided in favor of the defendants. All suits brought in these States and in the States of Kansas, Idaho, Florida, and South Carolina and in the District of Columbia, the residence of the authors of the allegedly libelous article and the place in which the plaintiff spends the greater part of his time, have been dismissed. All the cases decided in the States of Pennsylvania, Virginia, and West Virginia have been decided in favor of the defendants. The only case tried before a jury in New York resulted in a verdict for the defendants.

Apart from the possibility, which is not here discussed, that the principle of *res judicata* is applicable in the situation discussed by the foregoing statistics, it is respectfully urged upon the Court's attention that the importance of the decision in the case before the Court is greatly enhanced by the fact that more than thirty suits based on the identi-

cal article are still pending in various jurisdictions. The prestige of this Court in other jurisdictions cannot be unknown to the Court itself, and the responsibility of leadership is correspondingly great. It may be noted that the pendency of other suits involving the same question is one of the best recognized grounds for a rehearing by a Court of Appeals. 4 C. J. 629; 30 L. R. A. 620; *Morrow* v. *Weed*, 4 Iowa, 77, 66 Am. Dec. 122.

A further indication of the transcendent importance of the decision of the Court in this case, especially at such a time as the present, when it is particularly vital to preserve freedom of comment and of the press,[11] is the fact that the application of the principle of the majority opinion would require the courts to be prepared for innumerable suits against the publishers of the most conservative newspapers and other periodicals in which appear every day news items and comments not distinguishable in their general tenor from the publication which is before the Court in this case. For example, the New York Times on July 18, 1941, said of a speech by Secretary of the Interior Ickes that it "denounces Lindbergh as the 'knight of the German eagle' and a propagandist for the 'Nazi party line in this country'." Another New York newspaper, PM, on July 16, 1941, in a news story regarding Governor Talmadge of Georgia, commented: "At a time when Democracy is embattled everywhere the Governor is doing his best to undermine it by playing on bigotry and prejudice". PM added that "Talmadge was adapting racial theories of Naziism to his own subversive purposes". The Washington Post on April 24, 1941, reported that Governor O'Daniel of Texas "stands for some of the very things which make us hate the Nazis".

A sample collection of similar comments is attached as Appendix B.

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[11] *New Yorker Staats-Zeitung* v. *Brush*, 170 N. Y. S. 993.

Your petitioner now invites the further attention of the court to the question of jurisdiction raised at the beginning of the petition.

The complaint contains no allegation of special damage and neither the complaint nor the bill of particulars submitted by the plaintiff contains any details with respect to the damage alleged to have been suffered by the plaintiff, an Ohio Congressman, through the publication of the article in question by a newspaper of limited circulation in the State of New York. The only allegation of injury in the complaint is contained in paragraph 6 in which the plaintiff alleges injuries in his standing in the community *wherein he resides*. The allegations in the complaint, even if they be regarded as admitted upon motion for judgment on the pleadings, do not lay the foundation for proof of any injury which could possibly amount to as much as Three Thousand ($3,000.00) Dollars.

Since this cause comes before the court on appeal from a judgment on the pleadings, the court should, it is submitted, examine all the papers of record in the case with a view to determining whether there is any legal justification for the continuance of the litigation. It is generally recognized that the purpose of the new Federal Rules of Civil Procedure is to expedite (not to facilitate) litigation. To save litigants' time and expense, it is important for this Court to consider questions which may determine the controversy without the necessity for further procedure in the court below. Reference is made in this connection to the case of *Palmer* v. *Palmer*, 31 F. Supp. 861, reported in Clark's *Cases on Pleading and Procedure* (1940 ed.), page 930.

The courts have uniformly held that a mere allegation by the plaintiff that a sum involved exceeds Three Thousand ($3,000.00) Dollars and the mere claim of damages in excess of that amount are not conclusive to show that the

jurisdictional amount exists.[12] If an examination of the pleadings reveals that the amount of possible recovery in this case cannot, by any reasonable possibility, exceed Three Thousand ($3,000.00) Dollars, neither this Court nor the court below would have jurisdiction to proceed further with the case.

Your petitioner further invites the attention of the Court to the fact that but slight consideration has been given to the question of privilege raised by the pleadings. As has been indicated above, the effect of the opinion of the majority of this Court upon decisions in other pending suits and upon the currents of opinion throughout the United States in these times will be enormous. To omit consideration of the question of privilege might be to give the impression that that question was not deemed by the court to be pertinent or important in this case. Even if there were before the court no answer, setting up an unqualified privilege, it would still be appropriate for this Court to follow the practice which was followed in *Gardner* v. *Home Life Publications, Inc., supra,* in which the following statement was made:

> "• • • in reading and interpreting the article, we may consider facts of common knowledge, among which are that people are watching with great care and are desirous of being informed concerning all questions of taxation and the acts of public officials in relation to the fiscal affairs of a city • • •.
>
> "Reading the article in the light of its own language and the common knowledge of present municipal finances and the interest of the public therein, we look upon it as an item of news and do not place upon it the same interpretation as does the plaintiff, nor do we regard it as libelous *per se.*"

See also New York Code of Civil Procedure, chap. 547,

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[12] *McNutt* v. *General Motors Acceptance Corp., supra.*

as reported in Clark's *Cases on Pleading and Procedure* (1940 ed.) 907.

There is before the court, however, an answer in which the question of privilege is raised, and since a favorable determination of that question would terminate this litigation, and since that question does not appear to have been considered and passed upon by the court, it is earnestly suggested that an opportunity now be given for the consideration of that question upon a rehearing.

In view of the importance of the issues involved in this case, your petitioner respectfully requests that upon rehearing, the case be heard and considered by all the members of the Court. In the words of Judge Biggs, with the concurrence of Judges Mavis, Clark, Jones, and Goodrich on the point in question, in *Commissioner of Internal Revenue* v. *Textile Mills Securities Corporation,* 117 Fed. 2d, 62, 70:

> "A Court, as distinguished from a quorum of its members whom it may authorize to act in its name, cannot consist of less than the full number of its members. • • • Where • • • there is a difference in view among the judges upon a question of fundamental importance, and especially in a case where two of the three judges sitting in the case may have a view contrary to that of the other three judges of the Court, it is advisable that *the whole Court* have the opportunity, if it thinks it necessary, to hear and decide the question. Common sense and sound practice dictate that the five judges of this Court should be in a position to decide the principles of law and practice to which the Court is to be commited."

Conclusion

The ruling of the majority of the Court with respect to the applicable principles of the law of the State of New York is, it is respectfully submitted, contrary to well established precedents. It would dangerously restrict the freedom of the press, not only in the State of New York, but,

by reflection, in many other States in which the authority of this Court is highly regarded. The controversy between the parties can be concluded by a decision of the questions of jurisdiction and privilege in accordance with the views suggested in this petition. Since the majority opinion has failed to pass upon these questions, it is earnestly suggested that they be considered and determined by the entire Court upon rehearing.

Respectfully submitted,

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Certificate of Counsel

Comes now WILLIAM A. ROBERTS, of Counsel for Schenectady Union Publishing Company, and certifies that he has read and knows the contents of the foregoing petition, and that said petition is filed in good faith and not for the purposes of delay.

WILLIAM A. ROBERTS,
Of Counsel.

Washington, D. C., August, 1941.

APPENDIX A—Status of Merry-Go-Round Suits

Cases Won and Dismissed

Arkansas

Dismissed May 7, 1941—Judge Lemley

Little Rock Arkansas Gazette	Sued December 21, 1939
Pine Bluff Commercial	Sued December 27, 1939

District of Columbia

Dismissed April 11, 1941—Judge O'Donoghue

Washington Times-Herald
Pearson and Allen

Florida

Dismissed February 10, 1941—by Sweeney's attorney

Jacksonville Times-Union	Sued December 22, 1939

Idaho

Dismissed March 5, 1941—Judge Cavanah

Boisé Capital News	Sued December 11, 1940

Illinois

Hung jury, January 17, 1941—Judge Holly

Chicago Herald-American

Kansas

Dismissed June 16, 1941—Judge Hopkins

Atchison Globe	Sued December 22, 1939
Concordia Blade-Empire	Sued December , 1939
El Dorado Times	" " " "
Garden City Telegram	" " " "
Great Bend Tribune	" " " "
Hutchinson Publishing Co.	" " " "
Junction City Daily Union	" " " "
Ottawa Herald	" " " "
Topeka State Journal	" December 22, 1939
Winfield Daily Courier	" December 24, 1939

New York

Jury Verdict for defendant—February 26, 1941—Judge Conger

United Features Syndicate

Dismissed January 8, 1941—Judge Cooper
Ruling for plaintiff July 18, 1941—Court of Appeals
Schenectady Union-Star Sued December 13, 1939

Ohio

Dismissed July 27, 1940—Judge Fritch
Dismissed February 27, 1941—Court of Appeals
Dismissed May 8, 1941—Supreme Court (34 N. E. 2d, 764)
Akron Beacon-Journal Sued December 14, 1939
Dismissed July 18, 1941
Columbus Dispatch
Dismissed May 3, 1941
Coshocton Tribune
Dismissed June 4, 1941
Dayton News
Dismissed June 10, 1941—Judge Lindsay
Dover Reporter Sued December 26, 1939
Dismissed May 19, 1941—Judge Fritch
Elyria Chronicle-Telegram
(No definite information)
Hamilton Journal-News Sued December 19, 1939
Irontown News
Dismissed June 10, 1941—Judge Lindsay
Urichsville Evening Chronicle

Pennsylvania

Dismissed May 8, 1941—Judge Fitzpatrick
Allentown Chronicle and News Sued December 21, 1939
Lancaster Intelligencer-Journal
Sued December 28, 1939
Philadelphia Record

South Carolina

Dismissed March 7, 1941—Judge Lumpkin
Greenwood Index-Journal Sued December 20, 1940

Tennessee

Dismissed April 29, 1941—Judge Darr
Chattanooga Free Press
Dismissed January —, 1941—Tennessee Supreme Court (147 S. W. 2d, 406).
Nashville Tennessean

Virginia

Dismissed June 17, 1941—Judge Way
Newport-News Daily Press
Dismissed June 30, 1941—Judge Way
Suffolk News-Herald Sued December 16, 1939
Dismissed September 3, 1940—Judge Barksdale
Martinsville Daily Bulletin Sued December 22, 1939

West Virginia

Jury Verdict January 11, 1941—Judge Watkins
Clarksburg Exponent Sued December 22, 1939

Other Cases

New York—Two cases pending.
Pennsylvania—Nine cases pending.
W. Va.—Two cases pending.
Virginia—Two cases pending.
Arkansas—One case, motion for dismissal denied.
Illinois—One case, motion for dismissal denied.
Arizona—One case, motion for dismissal denied.
Wisconsin—One case, motion for dismissal denied.
Mass.—Six cases pending.
Missouri—To cases pending.
Texas—One case pending.
Washington—One case pending.
Panama—One case pending.

APPENDIX B.

Excerpts from Recent Publications Which Would be Libelous under This Court's Decision

1. *New York Times*—May 26:

Alexander Woolcott: "Have you any doubt, any doubt at all, that Hitler would have been glad to pay Lindbergh an immense amount, millions, for the work that he has done in the last year?"

2. *New York Times*—April 14:

Ickes described Lindbergh as "the number one Nazi fellow traveller."

3. From *Look,* August 12th issue:

Under six pictures, with a general caption of:

"These are the Petty Fuehrers Who Need Lindbergh as Leader!"

are the following comments:

"Lindbergh renders highest possible service to every one of Fascist group. He gives American Fascism a moral base on which to operate."

"George Deatherage is a petty Fuehrer who knows how to makes speeches in the most patriotic accent."

"Lindbergh, wittingly or not, foments the hysteria on which such men feed."

"William Dudley Pelley, is a notorious Fascist. Recently Pelley named Lindbergh, Wheeler, and Mosely among 'the true leaders of a renovated, purged America'."

"Joseph McWilliams, a leader of New York anti-Semitic hoodlums, organizer of tacky, fly-by-night Fascist group, is typical of the rabble-rousers who only need a Fuehrer to lead them."

"Major-General George Vanhorn Mosely is the sort of agitator to fear—the one in clean clothes with well-kept nails. Fascism's Typhoid Marys are often respectability itself."

"Father Charles E. Coughlin, noted anti-Semite and pro-Fascist advocate of the Christian World—might become as powerful as Germany's Goebbels under a Fascist 'new' leadership."

4. From *New Republic,* July 28, 1941—Page 106

"It is common gossip in Washington that there is widespread anti-Semitism in the foreign service. Consuls in Europe who have repeatedly been charged with putting difficulties in the way of Jews seeking American visas are Leland B. Morris, of Berlin, and James B. Stewart, of Zurich."

5. From *PM*, July 20, 1941—Page 43

Referring to Governor Talmadge of Georgia:

"He is a loud mouthed narrow-minded fellow who has preached racial inequality and social inequality and who said in 1936: 'Hitler is a mighty fine man • • • ain't it so?'"

6. *Time* Magazine, September 16, 1940

Referring to Representative Sweeney of Ohio as a "Coughlinite."

7. From *New York Times*, May 27, 1936

Carries an AP dispatch stating "Mr. Sweeney has been one of the chief unofficial spokesmen in Ohio for Father Coughlin." Under the ruling of the Court of Appeals in New York, the *New York Times* and the AP both libeled Congressman Sweeney.

8. *PM*, April 25, 1941

Wrote of William R. Davis, the American oil man who had sold oil to Hitler "The British consider him a Nazi agent. • • • While Mr. Davis may not be, in a technical sense, a Nazi agent, he has been playing Hitler's game since 1933 and he still is at it. He has performed some valuable services for Hitler."

9. From *Herald-Tribune*, February 26, 1941

New York State Senator William J. Murray, who is a Democrat, charged that Justice Herbert O'Brien's views expressed at many public meetings at which he presided "tend to incite prejudice and religious hatred. • • • Judge O'Brien has been a consistent and conspicuous promoter of factionalism along racial and religious lines and is engaged in activities tending to incite riots.